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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 307.

ISBRANDTSEN-MOLLER CO., INC.,
Appellant,

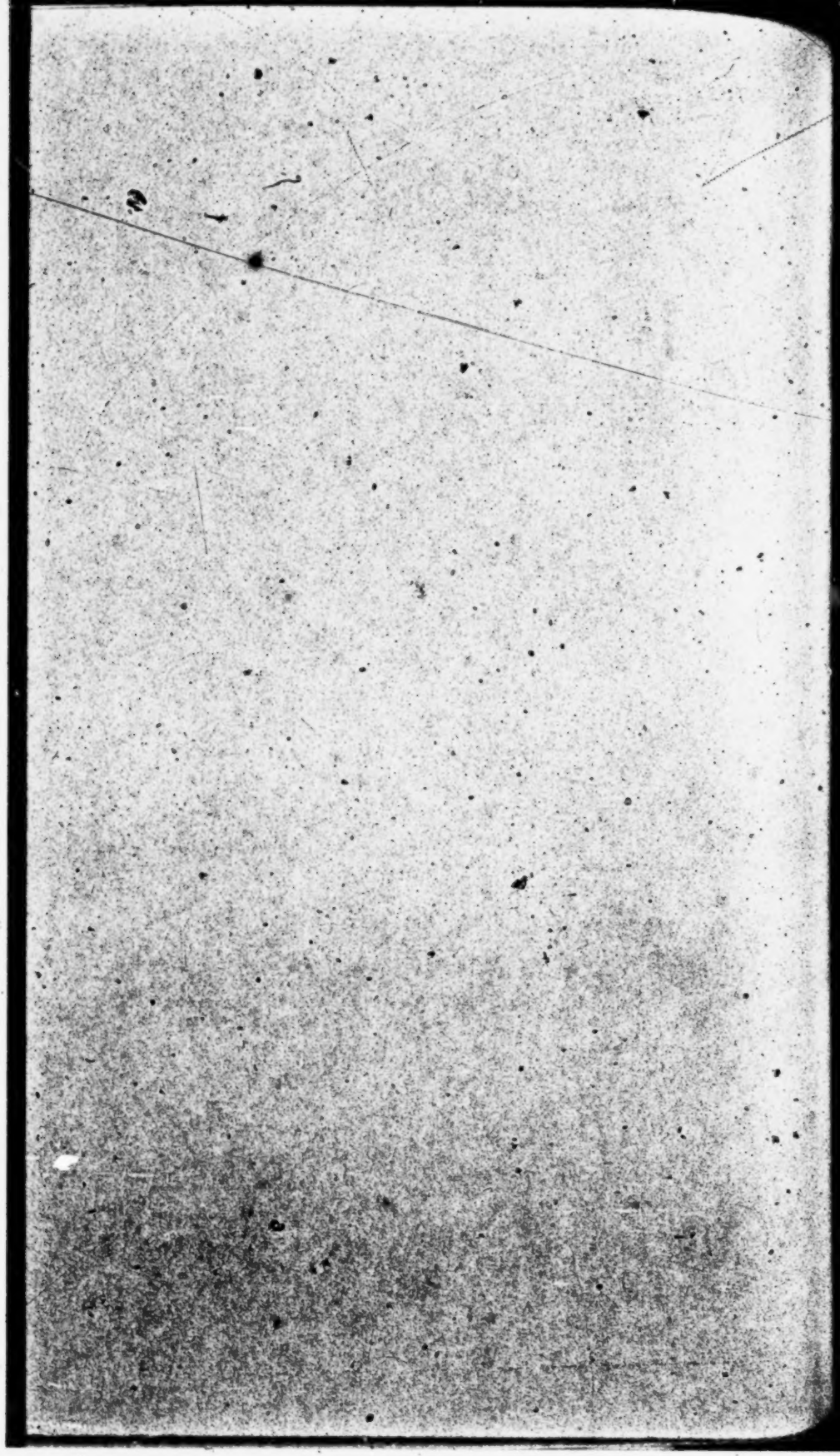
—against—

THE UNITED STATES OF AMERICA, DANIEL C. ROPER, individually and as Secretary of Commerce of the United States, *et al.*,
Respondents.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT ISBRANDTSEN-MOLLER CO., INC.

JAMES W. RYAN,
Counsel for Appellant.



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The District Court does not mention, and plainly overlooked, the fact that after finishing with "executive agencies" Congress, in another part of the same Economy Act, proceeded to provide for the permanent continuance of the United States Shipping Board through three Commissioners appointed by the President for fixed terms of years and confirmed by the Senate and not subject to removal or "abolition" excepting for inefficiency or misconduct.

The District Court further erred in resolving a "doubt" whether the Shipping Board was an "executive agency" on the basis of a mistaken assumption that Congress was in session for sixty days after June 10, 1933 (the fact of common knowledge being that Congress adjourned for the Session on June 16, 1933), and on the basis of an assumption that Congress' action in a minute paragraph of two appropriation acts in "providing funds to pay the salaries and expenses" (R. 56) of

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certain employees in the Department of Commerce who were called a Shipping Board "Bureau", and in casually mentioning as mere matter of recital or citation the Shipping Acts and the attacked Executive Order by "number" and "date", constituted a "ratification" of the invalid Executive Order so as to repeal the plain and detailed provisions in the Economy Act that the Shipping Board was to continue permanently as a body entirely outside the executive departments or executive control.

The District Court further overlooked the fact that in the Appropriation Act of June 16, 1933, by appropriating money for salaries of the three Shipping Board Commissioners provided for permanently in the Economy Act, for the fiscal year ending June 30, 1934, Congress plainly invalidated (assuming for purpose of argument it needed invalidating) the Executive Order of June 10, 1933, purporting to give undesignated employees in the Department of Commerce the powers and offices of the Shipping Board Commissioners.

The District Court further overlooked the fact that Section 21 of the Shipping Act, 1916, which is U. S. Code, title 46, section 820, is not mentioned in either of the appropriation acts which it states (R. 56) in its opinion are a "ratification", and yet that is the one under which the Secretary of Commerce attempted to justify his order here involved. The only sections mentioned in those Appropriation Acts are U. S. Code, title 46, sections 804, 805, 861-889, and 891-891-x, all of which relate to mail contracts, construction loan funds and other special matters which might be administered by a bureau in an executive department, but do not include a single section of the Shipping Act, 1916, dealing with regulation or with the quasi-legislative or quasi-judicial functions of the United States Shipping Board..... 42

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BRIEF FOR APPELLANT ISBRANDTSEN-MOLLER CO., INC.

Opinions Below.

The District Court's opinion (R. 47) is reported as *Isbrandtsen-Moller Co.* v. *United States,* 14 Fed. Supp. 407.

Jurisdiction.

The final decree (R. 58) of the District Court was entered on May 22, 1936. The appeal was allowed on May 22, 1936 (R. 71). The jurisdiction to review the decree complained of, by direct appeal, is conferred by Section 31 of the Shipping Act, 1916 (U. S. C., Title 46, Sec. 830), Section 208 of the Judicial Code (U. S. C., Title 28, Sec. 46), and the

Act of October 22, 1913, Chapter 32 (U. S. C., Title 28, Secs. 43, 44, 45 and 47).

Probable jurisdiction was noted by this Court on October 12, 1936.

Statement of the Case.

This is an appeal from a final decree of the District Court for the Southern District of New York denying appellant's motion for an injunction, and granting the motion of the respondent Secretary of Commerce and of the respondent United States of America to dismiss the complaint for failure to state facts sufficient to constitute a cause of action. No answer to the complaint has been filed by any of the respondents.

The motion for an injunction and the motion to dismiss were heard on February 15, 1936. In support of its motion for an injunction the appellant filed two affidavits of Hans Isbrandtsen (R. 18, 23). The respondents submitted affidavits in opposition of H. S. Brown (R. 37), S. D. Schell (R. 42), and R. H. Hallett (R. 45).

Certain respondents other than the Secretary of Commerce and the United States of America moved to quash process, and filed an affidavit of J. F. Davidson (R. 22). The motion to quash as to them was granted, and no error is urged with reference to it.

The complaint seeks an injunction to restrain the enforcement of an order issued by the respondent Secretary of Commerce purporting to act as the United States Shipping Board under Section 21 of the Shipping Act, 1916.

The Order of the Secretary of Commerce.

The order dated November 18, 1935 (R. 5), requires the appellant to produce and file on December 16,

1935, with the Secretary of Commerce a copy or summary of its books and records showing for the period from September 1st to November 12th, 1935, all commodities it has carried from the United States to foreign countries, specifying each commodity by name, and stating the point of shipment, point of destination, and freight rate charged or collected on each commodity, together with the effective date of the rate. The copy or summary must further show each transshipment rate charged, and the same particulars with respect to it, and also each terminal or other charge, together with all rules affecting the rates or the value of the services rendered.

The order is entitled "In the matter of filing rates and charges by common carriers by water in foreign commerce". It recites that it appears that full information as to rates in connection with transportation "of certain property" from the United States to foreign countries "by carriers by water in foreign commerce subject to the Shipping Act, 1916, is necessary to the proper administration of the regulatory provisions of said act" (R. 5), and that Isbrandtsen-Moller Co., Inc. is a common carrier by water in foreign commerce.

The order states that it is issued "In pursuance of the powers conferred by Section 21 of the Shipping Act, 1916" (R. 5). It is signed by "Daniel C. Roper, Secretary of Commerce" (R. 6).

"Department of Commerce, Office of the Secretary,
Washington

In the Matter of Filing Rates and Charges
by Common Carriers by Water
in Foreign Commerce

Order

It appearing, That full and complete informa-

tion as to the rates and charges for or in connection with the transportation of certain property from continental United States to points in foreign countries by carriers by water in foreign commerce subject to the Shipping Act, 1916, is necessary to the proper administration of the regulatory provisions of said act;

It appearing further, That Isbrandtsen-Moller Company, Inc., is a common carrier by water in foreign commerce subject to the Shipping Act, 1916;

It is ordered, In pursuance of the powers conferred by Section 21 of the Shipping Act, 1916, that Isbrandtsen-Moller Company, Inc., be, and it is hereby, notified and required to file with the Division of Regulation, United States Shipping Board Bureau, of this Department, at its office in Washington, D. C., on or before December 16, 1935, each port-to-port and trans-shipment rate charged and/or collected by it during the period from September 1, 1935, to November 12, 1935, both dates inclusive, for the transportation of property, except cargo loaded and carried in bulk without mark or count, from all points in continental United States of America to all points in foreign countries; indicating plainly as to each such rate, the place from and to which it was charged and/or collected, the effective date thereof, and the name, in alphabetic order, of each commodity moving thereunder; showing also each terminal or other charge, privilege or facility, granted or allowed, and any rules or regulations which in anywise changed, affected, or determined any part of any such aforesaid rate, or the value of the service rendered to the consignor or consignee;

It is further ordered, That the aforesaid filing be in printed, typewritten, or mimeographed form, personally subscribed by an officer of said

Isbrandtsen-Moller Company, Inc., who shall specify his title and verify the accuracy and completeness thereof under oath;

It is further ordered, That copy of this order be served upon said Isbrandtsen-Moller Company, Inc.

(Sgd.) DANIEL C. ROPER,
Secretary of Commerce.

November 18, 1935."

Grounds Specified as Basis for the Order.

At the hearing in the District Court counsel for the Secretary of Commerce submitted affidavits of Harry S. Brown (R. 37) and Samuel D. Schell (R. 42) to show the grounds on which the order was based.

Affidavit of H. S. Brown.

The affidavit of Harry S. Brown (R. 37), Chief of the Division of Regulation in the Shipping Bureau set up by the respondent Secretary of Commerce, specifies the grounds of the order as follows:

(1) Because the Secretary of Commerce is by the Shipping Act, 1916, "charged with the duty to see to it that no common carrier by water violates the Act by making or giving any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever" (R. 37);

(2) Because the Secretary of Commerce is by that Act charged with the duty to see to it that no common carrier by water "subjects any person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever (see Sec. 16 of said Act)" (R. 38);

(3) Because the Secretary of Commerce is by that Act charged with the duty to see to it "that no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors (see Sec. 17)" (R. 38);

(4) Because the Secretary of Commerce "is also charged with the duty of investigating the relative cost, advantages and disadvantages of operating in the foreign trade vessels under United States registry and under foreign registry (see Sec. 12 of said Act)" (R. 38);

(5) Because the Secretary of Commerce "is under a duty to sell, as soon as possible, all of the merchant vessels owned by the United States, and, in order to accomplish this purpose, is specifically charged with keeping himself informed as to the sale price of vessels in the domestic and foreign market, the available supply of vessels and the demand for the same, existing freight rates and prospects of their maintenance (see Sec. 5 of the Merchant Marine Act, 1920)" (R. 38);

(6) Because "In order to carry out the purposes of the said Acts and to perform the many functions and duties placed upon the Secretary of Commerce, he has found it necessary to require the submission to him by common carriers by water engaged in foreign commerce of schedules of rates and charges actually made for the transportation of property" (R. 38);

(7) Because "Inasmuch as under the provisions of the law, shippers and localities are given a specific

interest in determining whether any undue preference or advantage is being granted any shipper or locality to the disadvantage of some other shipper or locality, it has been incumbent upon the Secretary of Commerce to make all such information as gathered by him concerning rates and charges public" (R. 38);

(8) Because the Secretary of Commerce issued the order under Section 21 of the Shipping Act, 1916, "for the purpose of carrying out the provisions of the aforesaid Acts" (R. 39) "only after failing to persuade that Company (appellant) to file its regular rates" (R. 39);

(9) Because other carriers which are "members of conference agreements" (R. 39), and an undisclosed number of other carriers not members of conference agreements have filed "Schedules" of rates to be charged, and the Secretary of Commerce has "given full publicity" to those schedules (R. 39);

(10) Because "One of the purposes sought to be accomplished by the issuing to the complainant of the order in question" (R. 40), "was to determine whether or not the complainant was in fact maintaining a schedule of rates which were applicable on equal terms to all shippers or whether the complainant was charging different rates to different shippers for transportation of the same classification of freight" (R. 40);

(11) Because "Under Section 15 of the Shipping Act, 1916 (46 U. S. C., Sec. 804), Congress recognized the propriety of common carriers by water combining together for the purpose of stabilizing rates and other practices and excepted such combinations from

the provisions of the law commonly known as the Sherman Anti-trust Act and the Clayton Act, providing that the contracts, agreements and other memoranda creating such combinations were kept on file with the Government and were approved by the Government" (R. 40-41); "The experience of the Government has been that the existence of the conference agreements results in greater stabilization of rates and practices affecting foreign commerce * * *. With respect to many of the agreements, carriers engaged in the particular route are given the privilege of participating in contracts which have been signed by members of the conference with particular shippers regarding rates, in return for an undertaking that such carriers will comply with the rates, rules and regulations of the conference, even though not becoming members" (R. 41);

(12) Because "While there are many foreign shipping companies and American shipping companies owning or operating foreign flag ships who are members of the conferences, the sailings of vessels flying the United States flag are in the majority of the conferences so numerous as to compare favorably with those of any other particular nation" (R. 41); and

(13) Because "The control by the Government of the conferences in which there are no members who are citizens of the United States using vessels flying the United States flag has been most advantageous to the exporters and importers of the United States and has been one of the most potent methods of preventing rate wars which almost always result ultimately in excessive freight rates" (R. 41-42).

Affidavit of S. D. Schell.

The affidavit of Samuel D. Schell (R. 42) specifies an additional ground on which the order was based as follows:

(14) Because "The Secretary of Commerce as the successor of the United States Shipping Board, is now maintaining and operating a small number of said steamship lines which are still considered necessary to accomplish the purposes of said Act (Merchant Marine Act, 1920) and for which purchasers have not yet been procured. * * * The said steamship lines are operated in competition with steamship lines owned by foreign companies * * *. The United States Shipping Board and the Secretary of Commerce, as its successor, has authorized and encouraged the said private corporations acting as agents (of the Secretary of Commerce) in managing and operating the steamship lines owned by the United States to become members of Conferences approved as required by Section 15 of the Shipping Act, 1916 (46 U. S. C. 801, *et seq.*) for the purpose of stabilizing rates and other practices obtaining in the particular routes which are served by said steamship lines" (R. 43-44).

The Complaint.

The complaint (R. 3), sets forth five causes of action.

The first is that the order of the Secretary of Commerce, purporting to act as the Shipping Board, is invalid because Congress did not intend by the Executive Department Reorganization Act of 1932 to authorize the President to abolish the Shipping Board and transfer its functions to an executive officer such as the Secretary of Commerce; and that if Congress

had so intended the Reorganization Act of 1932 would be unconstitutional in attempting to make the active head of an Executive Department also a judicial officer and a legislative officer of the United States, and in failing to set up an "adequate declaration of policy or standard of action", and in that the President promulgated the order of transfer without adequate hearings and findings of fact on which to base it.

The second cause of action (R. 12) is that the order of the Secretary of Commerce is invalid because it is in substance an attempt by one of appellant's competitors to "regulate" or "stabilize" appellant's rates, and also compel appellant to charge rates fixed by a shipping monopoly of which that competitor of appellant is a member. It is alleged that before the order was issued the Secretary of Commerce had transferred all his Shipping Board functions to the defendant Peacock who was the President of a private steamship corporation which was actively operating vessels in the same trade in competition with those of appellant, and which was a member of a conference or shipping combination whose interests were opposed to those of an independent or non-conference company like appellant and for whose financial benefit the order complained of had been issued, and that "the separation of powers between the legislative, judicial and executive branches of the Government and the Due Process Clause of the Fifth Amendment to the Constitution of the United States prohibit the exercise of regulatory or quasi-judicial functions such as were entrusted to the United States Shipping Board, 1916, by persons or agencies having interests as above set forth, and therefore render null and void the said order of November 18, 1935" (R. 13).

The third cause of action (R. 13) is that the order of the Secretary of Commerce was issued, not for a

public purpose authorized or designated by Congress, but in furtherance of a concerted plan of respondents to compel an independent or non-conference carrier like appellant either to join a conference or shipping monopoly or else to suffer serious damage from disclosure to its competitors of its current private business records and rates charged and commodities moved which were required by the Secretary of Commerce's order to be filed with him. It is further alleged that the Secretary of Commerce's order was issued to promote and foster a shipping monopoly of appellant's competitors.

The fourth cause of action (R. 14) is that the order of the Secretary of Commerce is an unjust discrimination against the appellant, contrary to the due process clause of the Fifth Amendment to the Constitution of the United States, because it requires appellant to file a record of its actual transactions showing the rates which it had just charged on particular goods between named ports, whereas the only order issued by the Secretary of Commerce to appellant's competitors, the Conference Lines or shipping combination, requires merely the filing of general rate schedules in the future which are not always adhered to, and which need not be adhered to under any law or government regulation. It is also alleged that the order of the Secretary of Commerce to appellant was issued under Section 21 of the Shipping Act, 1916, violations of which carry a heavy penalty, whereas the "order" issued by the Secretary of Commerce to appellant's competitors was not issued under Section 21 or any other section of the Shipping Act, 1916, and carried no penalties for non-observance, and called only for information which those competitors were already required by law (Section 15, Shipping Act, 1916) to file, because of their having joined together in a conference or shipping combination.

The fifth cause of action (R. 15) is that enforcement of the order should be enjoined because shortly after it was issued the Secretary of Commerce rejected appellant's offer to file its recent records as demanded, on condition that they would not be turned over to appellant's competitors so as to cause serious damage to appellant; and because the Secretary of Commerce thereupon, by stating that his purpose in issuing the order was to turn appellant's records over to the public, supplemented the order so as in effect to require appellant to keep its competitors (the conference lines or shipping combination) informed of all business being transacted by it as an independent steamship company, thus enabling them to compete unfairly and ruin appellant's business. It is further alleged that there is no way in which appellant can comply with the order without prejudicing or losing its equitable, legal and constitutional rights.

Affidavits of Hans Isbrandtsen.

The affidavit of Hans Isbrandtsen, President of appellant, dated January 3, 1936 (R. 18), states that the enforcement of the order of the Secretary of Commerce against appellant, and the collection of the penalties, will cause serious injury to and possible destruction of appellant's business by divulging to appellant's competitors its current trade and rate transactions, and other private business information as just recorded in appellant's books, and will also, for the other reasons set forth in the complaint, cause irreparable injury to appellant.

The affidavit of Hans Isbrandtsen dated February 18, 1936 (R. 23) states:

That the facts and appellant's position with respect to the order of the Secretary of Commerce are cor-

rectly stated in Exhibit A (R. 28A), Exhibit B (R. 28B), and Exhibit C (R. 28C) annexed to the affidavit;

That H. S. Brown, the assistant to the Secretary of Commerce on whose affidavit (R. 37) the respondents rely as stating the specific grounds on which the order of the Secretary of Commerce was based, stated, or admitted to appellant's president orally in the presence of witnesses that the order was issued only for the purpose of turning over the information, consisting of appellant's records, to "two of complainant's competitors, namely, the Black Diamond Line and the Dollar Line, both of whom are members of steamship conferences or combinations actively competing with complainant" (R. 24); and that at another time H. S. Brown admitted or "stated in writing that the purpose of the Shipping Board Bureau in investigating the rates and business of non-conference lines was to benefit the conference lines" (R. 24).

That "Congress has never intended in the Shipping Act of 1916 or otherwise to require independent or non-conference steamship lines to join the so-called conference or shipping monopoly, Congress having intended to leave it as a purely voluntary matter whether or not a steamship line wished to join such a conference, but requiring that if it did join such a conference thereby violating the Sherman Anti-Trust Act, it would be required by Section 15 of the Shipping Act of 1916 to file its rates with the United States Shipping Board or otherwise be subjected to the penalties and prosecutions under the Sherman Anti-Trust Act because of furthering a shipping monopoly" (R. 24);

That "complainant has a legal right to carry on its business in United States waters as an independent or non-conference steamship line without being compelled by harassment, by a government bureau or

otherwise, to join the conference or shipping monopoly" (R. 25);

That "the only proper economical and sound method of carrying on the steamship business is to do as complainant has been doing, namely, keep apart from shipping monopolies or conferences and afford to American shippers and exporters such a reliable, regular and economical service as an unsubsidized and efficient steamship line can render so as to enable American goods to reach foreign ports and markets at economical cost of transportation and thereby effectually compete with foreign sellers sending goods competitively to such foreign markets for sale" (R. 25).

That "such schedules of rates as have been filed by other carriers with the Shipping Board have been filed by carriers who are members of a conference or shipping monopoly and are required by Congress by Section 15 of the Shipping Act of 1916 to file such rates as a condition to not being prosecuted under the Sherman Anti-Trust Act" (R. 25);

That "Congress by the Shipping Act intended that only common carriers in interstate commerce, as distinguished from foreign commerce, should be required to file their rates with the Shipping Board, as is evident from Section 19 of the Shipping Act of 1916" (R. 25);

That "neither the Shipping Act of 1916 nor any other act of Congress requires such carriers as have filed their schedules of rates with the Shipping Board as members of a conference or shipping monopoly, to actually observe those rates, or has given the Shipping Board any power to compel them to do so, and deponent is informed and believes that in many instances such schedules of rates are in fact not observed by the conference lines or shipping monopoly, and that Harry S. Brown, whose affidavit has been filed by

defendants herein, simply is not sufficiently familiar with the actual practices in the steamship business of said conference lines to make a statement of his own knowledge" (R. 25);

That the order of the Secretary of Commerce "is in substance an effort by a competitor of complainant to regulate complainant's business and drive it from business as an independent or non-conference operator and compel it to join the shipping monopoly or conference as is plainly evident from the affidavit filed herein by Samuel D. Schell, dated January 27, 1936, and from the affidavit of Harry S. Brown, filed herein, dated January 25, 1936. The defendants Roper, Secretary of Commerce, and James C. Peacock are actively and directly competing with complainant in the same trades through exercising the functions of the United States Shipping Board Merchant Fleet Corporation (which deponent is informed was organized as a private corporation under the general laws of the District of Columbia for the purpose of engaging in the steamship business for profit as an operator of merchant steamships), and instances of this appear from several written steamship agreements signed by said defendants, and a true and complete copy of one of which is annexed hereto, marked Exhibit D" (R. 26);

That "So far as the purpose of regulating or stabilizing rates is concerned, which is stated at the end of the affidavit of Samuel D. Schell, and which is also stated as the purpose of the Shipping Board Bureau at page 6 of the affidavit of Harry S. Brown filed herein, deponent has taken the advice of counsel and is informed and believes that neither the United States Shipping Board nor the Department of Commerce has ever been authorized by Congress to regulate or stabilize rates in the foreign commerce of the

United States, the United States Shipping Board's authority in that respect being expressly restricted in the Shipping Act of 1916, Section 19, to requiring the filing of maximum rates in interstate commerce and being restricted by the inter-coastal act of June, 1933 to requiring the filing of schedules of rates in inter-coastal commerce. The affidavits of Samuel D. Schell and Harry S. Brown filed herein now disclose clearly and definitely that the Order of November 18, 1935 of defendant Roper is a palpable attempt to exercise a power of rate filing and regulation in the foreign commerce of the United States which Congress has repeatedly declined to confer on the United States Shipping Board or its alleged successor" (R. 26);

That "until the Order of November 18, 1935 was issued by defendant Roper, no nation in the history of the world had ever before attempted to regulate freight rates in foreign commerce from or to such nation" (R. 26); and

That "such attempt at rate regulation in foreign commerce by one nation would be impossible in practice and would inevitably result in disruption of international shipping by counter rate regulation by each nation against the other" (R. 27).

Exhibit A to Mr. Isbrandtsen's Affidavit.

Exhibit A (R. 28A), annexed as part of the affidavit of Hans Isbrandtsen, states:

That "The important fact is that the Conference Lines who attack us are mostly foreign lines. In almost all of the conferences a majority of the lines, both in number and tonnage are foreign. This shows the absurdity of suggesting that there is any national interest in stabilizing freight rates at a high level. Such a course would merely place an additional bur-

den on the foreign trade of this country for the benefit primarily of foreign ship owners" (R. 28A);

That the purpose of the Conference Lines "is to eliminate competition altogether" (R. 28A);

That if rates are "stabilized", the shippers and public must pay to all lines the rate at which the least efficient line can be operated" (R. 28A);

That appellant receives "no governmental aids or subventions of any character" (R. 28A);

That appellant's business "is not based upon rate-cutting and we do not operate at a loss" (R. 28A).

Exhibit B to Mr. Isbrandtsen's Affidavit.

Exhibit B (R. 28B), annexed as part of the affidavit of Hans Isbrandtsen, states:

That "In the North Atlantic trade and the Far East trade, the Conference Lines have almost a complete monopoly. If our company can be brought into line, the Conference Lines will be within sight of their goal, which is a 100% monopoly of American foreign freight service" (R. 28B);

That appellant is "an independent line which operates successfully without any aid from any government" (R. 28B);

That "The Shipping Board Bureau has made no secret of the fact that it supports the conference lines" (R. 28B);

That "the conference contract system with its penalties, etc., in the foreign trade" is the same system that has been declared illegal by the Government "in the intercoastal trade" (R. 28B);

That "no shipper has ever made any complaint of this line [appellant] or its methods" (R. 28B);

That "the conference lines, both in number and tonnage, are predominantly foreign" (R. 28B);

That the stated purpose of the conference lines is

"to monopolize transportation of American foreign commerce" (R. 28B);

That "many of the foreign steamship companies which operate a service from this country also operate a service to the same foreign markets from their own country" (R. 28B);

That in none of the exporting countries competing with American export trade is the information demanded in the order of the Secretary of Commerce required to be filed or made public (R. 28B);

That appellant, although using foreign ships, is "an American company, and we have no interests excepting in American foreign commerce" (R. 28B).

Exhibit C to Mr. Isbrandtsen's Affidavit.

Exhibit C (R. 28C), annexed as part of the affidavit of Hans Isbrandtsen, states:

That the order of the Secretary of Commerce "is not in accord with the functions of the Department of Commerce. The functions of the Department of Commerce are to promote foreign commerce and to maintain an open international market, by the free and unobstructed movement of goods at economical transportation cost. Further, the Bureau's attitude seems influenced too much by the selfish interest of the steamship combinations to which our competitors in the steamship trade belong and very likely also by the Bureau's own interest in the operation of its ships in combination with others" (R. 28C);

That the order of the Secretary of Commerce requires appellant "to disclose our private trade information to our competitors (although we are not unwilling that the Department should have it for its own information if it would agree to accept it on that condition)" (R. 28C);

That the order requires appellant "to throw open to the world at large trade data that many of our customers reasonably expect be kept private" (R. 28C);

That appellant takes "no part in monopoly or combination with others, or what might border thereon" (R. 28C), and renders economical transportation service to exporters and importers without coercion of any sort (R. 28C);

That appellant does not receive any of the benefits or special privileges which its competitors, the Conference Lines, have obtained by combination or monopoly, and that appellant's competitors are subject to regulation (such as by the order here involved of the Secretary of Commerce) because of having obtained such benefits and privileges of monopoly at the expense of American shippers in consideration of agreeing to such regulation (R. 28C);

That the practical effect of the order of the Secretary of Commerce is "to force an independent steamship company to join such a combination or to observe the practices of combinations or their fixed or frozen rates" (R. 28C).

That the effect of the order of the Secretary of Commerce is to prevent the maintenance of an open market in American foreign trade and to destroy independent steamship service (R. 28C);

That "up to this time American national shipping policy has always been formulated by Congress or a regulatory and quasi-judicial body, and not by a Bureau head. And that policy heretofore has followed the overwhelming national interest in maintaining the rights of American exporters and shippers generally to have access to the world freight market by maintaining the principle of free competition in transportation service in the foreign trade" (R. 28C); and

That there is no legal authority for "the one man dominating the Bureau to function as a regulatory or quasi-judicial body like the former Shipping Board Commission" (R. 28C).

Exhibit D to Mr. Isbrandtsen's Affidavit.

Appellant operates steamships between United States ports and foreign ports in competition with steamships owned and operated by the Secretary of Commerce (representing the United States) and his agents (R. 26).

Exhibit D (R. 29), annexed as part of the affidavit of Hans Isbrandtsen, is an Operating Agreement entered into on October 4, 1935, between the Secretary of Commerce "acting by and through the United States Shipping Board Merchant Fleet Corporation" (R. 29) and Cosmopolitan Shipping Company, Inc., of Delaware. The agreement provides that the Secretary of Commerce (representing the United States), as owner of the line of steamships "known as the America France Line, operating on berth service between United States Atlantic ports" and French ports, allocates five named steamships to be operated by the Cosmopolitan Company as Managing Agent for the Secretary of Commerce. The Secretary of Commerce has the right of "removal of any of" the employees on board his vessels, and the crews of the vessels are to be obtained through "the Department of Commerce" (R. 30). The maintenance and voyage repairs of the vessels are regulated, supervised and inspected as required by the Secretary of Commerce (R. 30). No repairs or expenses can be incurred except in serious emergency, without authority in writing from the Secretary of Commerce (R. 30).

The Cosmopolitan Company as "managing agent"

shall account to the Owner for all monies collected by it or its subagents or monies disbursed by its subagents" (R. 31).

"All business shall be carried on in the name of the said Line, for the account of the Owner" (R. 31).

"All traffic contracts shall be for the account of the Owner" (R. 31).

All books of account and vouchers "shall be the property of the Owner" (R. 31).

The books of all agencies of the Cosmopolitan Company shall be "accessible to the Owner to the extent of determining the profits made from transactions with the Line" (R. 32).

The Owner (the Secretary of Commerce) shall provide the insurance on the vessels (R. 32).

The Secretary of Commerce agrees to pay compensation to the Cosmopolitan Company as his managing agent for "the services rendered" (R. 32) of a lump "sum of $11,250.00 per calendar month" (R. 32) and three per cent. of the gross revenue "earned by the Line" (R. 32) and twenty-five per cent of the "net profits earned by the Line" (R. 33). "Net profit shall be computed on terminated voyages" (R. 33). If "conditions" change, the compensation shall be readjusted "and the decision of the Owner shall be final" (R. 33-34).

The "trade name under which a line or route is operated with vessels of the Owner" shall "not contain the name of the Managing Agent, and such trade name shall remain the property of the Owner" (R. 35).

"The Managing Agent shall not be permitted to operate * * * foreign flag vessels * * * or operate any vessels in competition with vessels allocated to the Managing Agent hereunder" (R. 35).

"Any question arising under the agreement shall be referred to the President of the Merchant Fleet Cor-

poration for determination, and his decision shall be final" (R. 36).

The agreement is signed:

"United States of America, by Secretary of Commerce, by United States Shipping Board Merchant Fleet Corporation, by J. C. Peacock, President (Seal).

Attest: S. D. Schell, Secretary.

Cosmopolitan Shipping Company, Inc., by A. F. Mack, President (Seal)" (R. 36).

Affidavit of R. H. Hallett.

The affidavit of R. H. Hallett (R. 45), assistant counsel in the Department of Commerce, states that on January 15, 1936, he requested from the Chief Clerk of the Department of Commerce "a certified copy of any order or orders issued by the Secretary of Commerce setting up the organization to administer the functions of the United States Shipping Board" (R. 45), and that "Pursuant to said request, I received the certified copy of an order which is attached hereto" (R. 45), and which consists of an intra-departmental order or memorandum (R. 46-47), dated August 9, 1933, of the Secretary of Commerce stating that certain employees in his department are to be known as a "Bureau" which "will be under the jurisdiction of Assistant Secretary Mitchell" (R. 46); that incoming correspondence "shall be routed in the usual Departmental manner" (R. 46), excepting that

"matters which will require action by the Secretary of Commerce involving major policies, shall be immediately forwarded to Assistant Secretary

Mitchell for transmission to the Secretary of Commerce. Correspondence or letters relating to such matters shall be prepared under the direction of Assistant Secretary Mitchell for signature of the Secretary of Commerce.

If the Secretary of Commerce *deems it advisable he may refer* any questions to an Advisory Committee for its advice. Said Advisory Committee will include in its membership *the present members of the Shipping Board.* It will receive the reports of any examiners appointed to investigate facts in connection with any proposed exercises of authority, and will report to the Secretary. The Advisory Committee will also advise the Secretary, if he so desires, as to the assignment of any matter to examiners for investigation and report.

(Signed) DANIEL C. ROPER,

Secretary of Commerce"

(R. 46-47). (Italics ours.)

Opinion of the District Court.

The opinion of the District Court states (R. 53-57):

That the Executive Department Reorganization Act of 1932, in order to reduce expenses and increase efficiency, authorized the President, after investigation and findings, to consolidate the functions of "executive agencies", or abolish any executive agency, or transfer any executive agency to the control of any other executive agency (R. 54);

That an executive agency is defined to be "any commission, independent establishment, board, bureau, division, service or office in the executive branch of the Government" (R. 54);

That any order of transfer or consolidation was to

be "submitted to the Congress while in session and shall not become effective until the expiration of sixty calendar days after such transmission" (R. 54);

That the President issued an order abolishing the Shipping Board and transferring its functions to the Secretary of Commerce;

That the recital in the order of transfer that hearings had been held and findings made establishes that the hearings were held and the findings made notwithstanding there is no evidence of those facts (R. 57);

That although "it is doubtful" (R. 55) whether the United States Shipping Board of seven Commissioners created by the Shipping Act, 1916, was an executive agency (R. 55), and although "It would appear more nearly correct to have considered it a board of specially selected members with neither political nor executive functions whose duties were quasi-judicial and quasi-legislative like those of the Federal Trade Commission (R. 55), that doubt "must be resolved against the complainant in view of the fact that after the order had been promulgated Congress adopted the construction thus given the Act"

> (1) "by permitting the order to become effective after notice to it" (R. 55); and
>
> (2) "by passing the Department of Commerce Appropriation Act (48 Stat. 546-566) providing funds to pay the salaries and expenses of that Department, *inter alia*, 'To carry out the provisions of the Shipping Act of 1916, as amended, and the Merchant Marine Acts of 1920 and 1928, as amended (U. S. C. A. title 46, secs. 804, 805, 861-889); * * *; Executive Order numbered 6166, June 10, 1933 * * *.' Again on March 22, 1935 it provided funds for the same department for another fiscal year using similar language. We

> think all this amply shows that Congress intended to confer upon the President authority to abolish the Shipping Board and transfer its functions to the Department of Commerce" (R. 55-56).

That Congress had the power,

(1) to delegate or grant to an executive of the Department of Commerce the powers as a quasi-judicial and quasi-legislative body "of specially selected members with neither political nor executive functions" (R. 55) which the United States Shipping Board of seven commissioners possessed under the Shipping Act, 1916 (R. 56), because

> (a) Congress "did not confer upon anyone functions it was bound to keep and exercise for itself" (R. 57); and
>
> (b) "there was no failure to preserve the required separation of governmental powers."

That the order of the Secretary of Commerce does not constitute unjust discrimination against appellant notwithstanding other steamship companies have not been subjected to a like order (R. 57). The only reason for this conclusion is that "It is alleged (in the bill) that this complainant is in a different situation from those against whom a different order was issued" (R. 57); "There is no showing that there has been any arbitrary or intentionally unfair discrimination against this complainant in favor of others in like situation" (R. 57).

That the daily penalty to which the order of the Secretary of Commerce subjects the appellant is insufficient to show "irreparable injury" (R. 57).

Based on the foregoing statements the District Court concludes:

> "Motion for an injunction denied and bill dismissed" (R. 57).

Final Decree.

The Final Decree (R. 58) of the District Court provides:

That the motion for an interlocutory injunction until entry of the final decree is denied (R. 58);

That the motion of James C. Peacock and certain other respondents (not including the Secretary of Commerce or the United States) to dismiss as to them for want of jurisdiction or venue is granted (R. 58); and

That the motion of the respondents Secretary of Commerce and United States of America "to dismiss the complaint for failure to state facts sufficient to constitute a cause of action" is granted (R. 58-59).

Specification of Errors Relied Upon.

Under Point I of this brief: Assignments of error Nos. *50* (49, 63, 65, 68; 52, 67, and 68);

Under Point II: Assignments Nos. *10* (51, 39, 40, 44, 43, 45, 46, 47, 48, 49, 54, and 55);

Under Point III: Assignments Nos. *1* (2, 3, 4, 11, 13, 18, 70, 20, 22, 23, 24, 25, 26, 27, 30, 38, 53, 56, 59, 61, 62, 63, 64, 65, and 69);

Under Point IV: Assignments Nos. *5* (6, 7, 19, 28, 29, 31, 32, 33, 34, 35, and 36); and

Under Point V: Assignments Nos. *9* (8, 37, 55, and 66).

POINT I.

The order of the Secretary of Commerce is invalid as an attempt to regulate or "stabilize" freight rates in *foreign* commerce. Congress has expressly restricted his (or the Shipping Board's) power of rate regulation to *interstate* and *intercoastal* commerce.

The attempt to regulate consists in requiring the filing of a carrier's (appellant's) current records of actual rate transactions and of designated commodities carried between named places, together with the "date" each rate was charged, and in the Secretary of Commerce giving such records "full publicity" (R. 7, 39).

This Court has recently considered the practical effect which "publicity" of business transactions has in regulating and restraining commerce.

In *Sugar Institute* v. *United States*, 297 U. S. 553, 585, this Court said:

> "Defendants concede the correctness of the statement of the trial court that if immediate publicity had been given to prices and terms in all 'closed transactions', competitive pressure would have been so great that the refiners 'would either have had to abandon the discriminatory concessions or extend them to all'. They concede that it is 'publicity' that prevents such concessions and 'not the sequence in time between the sale and the publicity'."

The Secretary of Commerce's statement (R. 7) that publicity is to be given to the rates which his order requires the appellant to file with him, deprives appellant of reasonable opportunity to carry on an

independent steamship business by making the deviations in rate which open and fair competition with the conference lines or steamship combination might require or justify.

This long-continued practical interpretation of the statute by the Board charged with the duty of executing it, has the force of law. *Kern River Co.* v. *United States,* 257 U. S. 147; *First Nat. Bank* v. *Missouri,* 263 U. S. 640, 658; *Swendig* v. *Washington Water Power Co.,* 265 U. S. 322. And that interpretation, continued through nineteen years, and through many changes in personnel of the Board, is that it has no power to issue orders like the present one for the purpose of regulating or stabilizing rates in foreign commerce, either by "publicity" of seized rate-records and commodity-movement transactions of individual companies, or otherwise.

Congress has never granted the Shipping Board any power of rate regulation in foreign commerce. The Shipping Act, 1916, Section 18 (U. S. C., Title 46, Sec. 817), granted the Board power of rate regulation, to the extent of fixing maximum rates, in *interstate* commerce, and the Intercoastal Shipping Act, 1933 (U. S. C., Title 46, Sec. 844), granted it power of rate regulation in the *intercoastal* trade, but Congress has steadfastly declined to grant it power over rates in foreign commerce. And the present order of the Secretary of Commerce of November 18, 1935, is the first attempt that has been made by the Shipping Board since the Shipping Act, 1916, was enacted, to assert any power of rate regulation, "stabilization" or fixing in foreign commerce.

Evidently what happened is that in the year 1933 the Shipping Board, dissatisfied with being able under

the Shipping Act, 1916, and the Merchant Marine Act, 1920, to regulate or fix rates merely in *interstate* commerce, applied to Congress for an extension of that power in other fields, but it was denied by Congress excepting to the extent of extending the Board's power over rates to *intercoastal* commerce. Then some ingenious employee of the Board or of the Secretary of Commerce conceived the idea (embodied in the order here involved of the Secretary of Commerce dated November 18, 1935) of using old Section 21 of the Shipping Act, 1916, for the illegitimate and unheard-of purpose of establishing rate regulation by the Board in *foreign* commerce despite Congress' refusal to grant it. A comparison of Section 2 of the Intercoastal Act, 1933 (quoted in the Appendix to this Brief) with the order of the Secretary of Commerce of November 18, 1935, shows that the order was drafted by copying or paraphrasing the Intercoastal Act, 1933, rate-regulation provisions, substituting "foreign" commerce for "intercoastal" commerce. This was clearly done without any Congressional authority whatever, and constitutes a perversion of the use which Section 21 was intended by Congress to serve. Section 21 was intended merely to grant to the Board subpoena power for production of records, reports, information, etc., to be exercised after complaint filed against a carrier for an alleged violation of one of the Shipping Act's prohibitions, and to be exercised in aid of the Board's power as the judicial officer or body hearing and determining the merits of the complaint. It was never intended to be used to support a mere "fishing expedition" in the absence of any complaint or proceeding whatever.

Indeed any power of rate regulation in foreign commerce would be inconsistent with the duties of a

partisan nature imposed by Congress on the Shipping Board so far as foreign commerce is concerned. The Board was created and organized with the primary duty in foreign commerce of advancing the interest of American shipowners, and this was made still more explicit in the Merchant Marine Act, 1920 (U. S. C., Title 46, Sec. 861), that "the primary end to be attained" by it was "to develop and encourage the maintenance" of an American "merchant marine". Another "primary" duty was imposed on the Board in the Shipping Act, 1916, of advancing its own interest and profit as operator of merchant vessels competing with foreign vessels (and appellant, R. 26, 44, 13) in American foreign commerce (U. S. C., Title 46, Sec. 810). And notwithstanding the Board's duty under Section 15 of the Shipping Act, 1916 (U. S. C., Title 46, Sec. 814), is to check instead of further the conferences or combinations formed by certain shipowners for a selfish and monopolistic purpose, the Board has further committed itself to a partisan or factional interest by entering its own vessels in those conferences or shipping combinations (R. 44, 12). The record in this case shows that all those combinations are dominated and controlled by foreign companies (R. 28B, 28A), and that they are attempting to drive independent steamship companies out of business or to compel them to join the combination (R. 14), and thus establish a complete shipping monopoly in American foreign commerce (R. 14) so that rates can be stabilized or fixed by "conference" agreements between themselves on a monopoly basis at the expense of American shippers and the public. The Board has further identified itself with "factions interested in the event" (*Doty* v. *Love,* 295 U. S. 64, 71) so far as foreign commerce is concerned by adopting a fixed policy (R. 14) of furthering the "exclu-

sive contract" or rebate system which the shipping combinations dominated by the foreign companies are using as a means of coercing American shippers into shipping only on conference vessels (R. 14), and which was held by this Court to be illegal as an unreasonable restraint of trade and unfair competition in *Thomsen* v. *Cayser*, 243 U. S. 66, 87.

These facts are established by the uncontradicted evidence in the present record, and by the uncontradicted allegations in the complaint. And affidavits showing these facts have been introduced in evidence by counsel for the Secretary of Commerce to show the grounds on which the order here attacked was based (R. 37, 42, 45). And the affidavit of Mr. Isbrandtsen introduced in evidence by appellant (R. 24) is undenied that the Secretary of Commerce's assistant, Mr. Brown has admitted in writing that the Bureau's purpose "in investigating the rates and business of non-conference lines was to benefit the conference lines" (R. 24), and has further admitted to Mr. Isbrandtsen orally in the presence of witnesses that "the demand for the rate information sought by the Shipping Board Bureau from complainant's files, in reality came only from two of complainant's competitors, namely, the Black Diamond Line and the Dollar Line, both of whom are members of steamship conferences or combinations actively competing with complainant" (R. 24).

POINT II.

This order of inquisition directed specially against appellant by the Secretary of Commerce to compel disclosures of fact, constitutes an unreasonable search and seizure, because no legitimate ground for it has been specified.

The order of the Secretary of Commerce is "an official inquisition to compel disclosures of fact" (298 U. S. at p. 25), constituting an unreasonable search and seizure of appellant's records and book entries in violation of the Fourth Amendment to the Constitution. (Assignment of Error No. 10.) "The purpose disclosed is not a legitimate one" and therefore appellant "may not be compelled to answer" (298 U. S. at p. 26). The order is "a fishing expedition * * * for the chance that something discreditable may turn up" (237 U. S. at p. 26; 264 U. S. at p. 305). An inquisition "is not an end, but a means to an end", and "the end must be a legitimate one" (298 U. S. at pp. 25 and 26).

No purpose of the inquisition is disclosed in the order of the Secretary of Commerce (R. 49) excepting that the disclosures of fact are "necessary to the proper administration of the regulatory provisions of said act" (the Shipping Act, 1916) (R. 49).

What those regulatory provisions are is specified in the affidavits of H. S. Brown and S. D. Schell filed by counsel for the Secretary of Commerce at the hearing in the District Court (R. 37). Thirteen grounds are specified by Mr. Brown (see p. 5 of this Brief), and an additional one is specified by Mr. Schell (see p. 9 of this Brief).

Grounds Nos. 1, 2, 3, 7 and 10.

The first, second, third, seventh, and tenth grounds specified by Mr. Brown (see p. 5 of this Brief) are plainly "a fishing expedition * * * for the chance that something discreditable may turn up" in the nature of a violation by appellant of some one of the penal provisions of the Act so that a complaint or proceeding may be brought against it for the penalty by a shipper or by the Secretary of Commerce. Each of those grounds is a specific offense prohibited by a section of the Shipping Act (Ground No. 1, U. S. C., Title 46, Secs. 816 and 812; Ground No. 2, U. S. C., Title 46, Secs. 815, 816, and 812; Ground No. 3, U. S. C., Title 46, Sec. 816; Ground No. 7, U. S. C., Title 46, Secs. 815 and 812; and Ground No. 10, U. S. C., Title 46, Sec. 816); and no such offense has ever been charged against appellant by complaint by a shipper or by the Secretary of Commerce or by anyone else. Moreover, the Secretary of Commerce's duties in connection with those grounds (assuming he has the duties of the Shipping Board) are not of a "regulatory" or legislative or executive nature, but are restricted to acting as a judicial officer after complaint has been filed, excepting that he may also act as prosecuting officer in filing a complaint or charge (U. S. C., Title 46, Sec. 813) of an act of violation after "due notice to all parties in interest and hearing" (U. S. C., Title 46, Sec. 813); and after doing this he acquires subpoena power under Section 21 of the Act through himself as the judicial officer.

In *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, at page 305, this Court said:

"Anyone who respects the spirit as well as the

> letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 479), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this Court to sustain such a claim is shown in *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407, and as to correspondence, *even in the case of a common carrier,* in *United States* v. *Louisville & Nashville R. R. Co.,* 236 U. S. 318, 335." (Italics ours.)

The Commission which was investigating the common carrier in the case of *United States* v. *Louisville Co.,* 236 U. S. 318, was the Interstate Commerce Commission, which had express authority to "regulate" the carrier with respect to the matter inquired about, whereas in the case at bar the Secretary of Commerce has no authority whatever to regulate rates in foreign commerce, which is the subject-matter of the demand in the order here involved. This Court's decision restricting the Commission's power of investigation in the case of *United States* v. *Louisville Co.,* 236 U. S. 318, therefore goes much further than is necessary to dispose of the present case in favor of appellant.

And how much more dangerous does the improper use of the power to investigate become when that power is vested, not in an independent board, but in a department of the Executive, which department is itself engaged in the shipping business in direct competition with the appellant being investigated!

Grounds Nos. 11, 12, 13 and 14.

The eleventh ground specified by Mr. Brown (see p. 7 of this Brief) is that "greater stabilization of rates" (R. 41) is desirable in "foreign commerce" (R. 41), and that the agreements of the steamship companies joining the conferences or shipping combinations to coerce this "stabilization" and "other practices" (R. 40), are, although still prohibited by Congress in "the Sherman Anti-trust Act and the Clayton Act" (R. 40) unless "approved by the Government" (R. 41), a means to such "stabilization" according to the "experience of the Government" (R. 41). And the thirteenth ground specified by Mr. Brown (see p. 8 of this Brief) is that the "conferences" have been "one of the most potent methods of preventing rate wars" (R. 42). The twelfth ground specified by Mr. Brown (R. 41), and the fourteenth ground (which is specified by Mr. Schell (R. 44), that the Secretary of Commerce has entered his own vessels in the conferences "for the purpose of stabilizing rates and other practices" (R. 44), further specify in substance that the purpose of the order is to coerce the appellant, an independent steamship company, into joining the conferences or monopoly, or "stabilizing" its rates at the same high level as the rates fixed by the "conferences". That the eleventh, twelfth, thirteenth, and fourteenth grounds specified as the basis of this order are not

legitimate, has already been decided by this Court in *Thomsen* v. *Cayser,* 243 U. S. 66, at pages 85 to 87, as follows:

> "The defendants were common carriers and it was their duty to compete, not combine; and their duty takes from them palliation, subjects them in a special sense to the policy of the law. * * *
>
> The argument that is employed to sustain the contention is one that has been addressed to this court in all the cases and we may omit an extended consideration of it. It terminates, as it has always terminated, in the assertion that the particular combination involved promoted trade, did not restrain it, and that it was a beneficial and not a detrimental agency of commerce. * * *
>
> The resultant good of the plan, it is said, was 'regularity of service, with *steadiness of rates';* and that 'the whole purpose of the plan under which the defendants acted was to achieve this result.'
>
> We may answer the conjectures of the argument by the counter one that if defendants had not entered the trade others might have done so and been willing to serve shippers without constraining them, been willing to compete against others for the patronage of the trade. And it appears from the testimony that *certain lines so competed until they were taken into the defendants'* combination.
>
> Nor can it be said that under defendants as competitors or that under competing lines service would not be regular or rates certain, or, if uncertain, that they would be detrimentally so." (Italics ours.)

The steamship companies which were held guilty in that case of unlawful coercion and purpose were also,

like appellant's competitors and the Secretary of Commerce's steamship agency in the present case, joined together in a "'conference'—to use the word employed by the witnesses to describe the combining companies." (*Thomsen* v. *Cayser*, 243 U. S. at p. 86.)

Indeed the fourteenth ground specified for the order (by Mr. Schell; see p. 9 of this Brief), that the Secretary of Commerce is himself operating steamships in competition with foreign companies (also including appellant,—see R. 25-26), and that his vessels are members of the conferences or shipping monopoly dominated by the foreign flat companies (R. 44, 28B), shows so plainly that the order is an effort by one competitor (the Secretary of Commerce) or "factions interested in the event" (*Doty* v. *Love*, 295 U. S. 64, 71), to regulate another competitor (the appellant steamship company), that the order should peremptorily be held invalid without further search for a remotely possible but unreal legitimate purpose.

Ground No. 4.

The fourth ground specified by Mr. Brown for the order (see p. 6 of this Brief) is that the Secretary of Commerce is under a duty to investigate the relative cost and advantages in the foreign trade of operating American vessels as compared with foreign vessels. Certainly that is a specious ground in view of the fact that the order is directed against only one company (appellant), and the evidence fails to show that the Secretary of Commerce already knows—or has made any investigation to ascertain—the cost of operating other foreign or American vessels.

Ground No. 5.

The fifth ground specified by Mr. Brown for the order (see p. 6 of this Brief) is that the Secretary of Commerce "is under a duty to sell, as soon as possible, all of the merchant vessels owned by the United States, and, in order to accomplish this purpose, is specifically charged with keeping himself informed as to the sale price of vessels * * * and * * * existing freight rates and prospects of their maintenance" (R. 38). Surely that is no reason for singling out the appellant company and confining his study to it alone. That ground is clearly not the real ground underlying this order.

Ground No. 9.

The ninth ground specified by Mr. Brown for the order (see p. 7 of this Brief) is that the Secretary of Commerce has "given full publicity" (R. 39) to certain "Schedules" of rates to be charged by "members of conference agreements" (R. 39). Aside from the fact that those "Schedules" are merely of rates to be charged in the future, and not required by any law to be actually observed so far as foreign commerce is concerned, and do not cover anything like the scope of the demand in the present order, the ground given is specious because the Shipping Act expressly requires "members of conference agreements" to file their agreements as to schedules so that shippers and the public through the Shipping Board will be warned that a shipping combination has been created and is exercising monopoly powers for its own selfish interest. Such a monopoly has always been subjected to special regulation or prohibition by Congress because of its evil effects on shippers and the public by restraining

free competition among common carriers. The fact that an undisclosed non-conference carrier or carriers (R. 39) may, as a volunteer and without legal requirement, have filed such a "schedule" of future optional rates, and that the Secretary may have given them "publicity", is obviously no reason why appellant should be required to file, not such a schedule, but a copy or summary from its current records and books showing actual commodity movements in detail, with rates collected, and details of the places between which each commodity was carried, and the "date" the charge was made, etc. A "schedule" of rates to be charged would include rates on every known kind of commodity to every place in the world to which goods could be carried or to which they could be transshipped by connecting carriers. It would indicate nothing with respect to what particular commodities the carrier was actually booking and carrying, or the places between which those commodities were being carried, or the nature or extent of the carrier's actual current business transactions; and yet it is all this last-mentioned information which the present order demands from appellant. The affidavits filed by counsel for the Secretary of Commerce, and the theory and line of reasoning adopted in the District Court's opinion, overlook and ignore entirely the fact that Congress has never granted to the Shipping Board any power whatever of regulating or stabilizing or fixing freight rates in the foreign trade. (See Point I of this Brief.)

Grounds Nos. 6 and 8.

The sixth and eighth grounds specified by Mr. Brown for the order (see p. 6 of this Brief) are mere generalities that "schedules" are necessary "to

perform the many functions" (R. 38) of the Secretary of Commerce, and that the order was issued "for the purpose of carrying out the provisions of the aforesaid Acts" (R. 39). No specific ground is given or provision cited.

The foregoing analysis shows that none of the fourteen grounds for the order specified in the affidavits filed by counsel for the Secretary of Commerce is a legitimate ground. Accordingly the present case falls within the long series of decisions of this Court, culminating in *Jones* v. *Securities Exchange Commission,* 298 U. S. 1, that such an order of inquisition without specified legitimate ground constitutes a violation of the "unreasonable search and seizure" clause of the Fourth Amendment to the Constitution. The order not only requires appellant, without legitimate reason, to "produce his private books and papers for inspection by the commission" (*Jones* v. *Securities Exchange Commission,* 298 U. S. at p. 25), but also requires that the entries in its current records and books showing actual business transactions (eliminating merely names of persons), commodity movements between specified places, and the "dates" on which the price or rate for each commodity movement was charged or collected, be turned over to appellant's competitors, who are banded together in a shipping combination or monopoly. The Secretary of Commerce acts only as an intermediary in this wholesale inspection by appellant's competitors of appellant's records. And the Record shows by the Secretary's own admission (in the affidavit of S. D. Sch[illegible]ll his assistant,—R. 44), and by Mr. Isbrandtsen's uncontradicted affidavit (R. 26), that the Secretary is himself a "faction interested in the event" (295 U. S.

64, 71) because he operates steamships in direct competition with those of appellant (R. 26, 44, 29-36), and is also interested in furthering a shipping combination or monopoly (R. 44, 41, 26, 28A, 28B, and 28C) at the expense of independent steamship companies like that of appellant. And the evidence is uncontradicted that a majority in each of the conferences consists of foreign lines, and that they dominate and control every conference (R. 28B). The purpose of the order of the Secretary of Commerce is therefore established by this Record to be to further the selfish interests of the foreign steamship companies which constitute the majority in the conferences or shipping combinations, and which control them. The affidavits filed by counsel for the Government carefully refrain from denying this fact. The nearest they come to the point is in the affidavit of H. S. Brown in which he says merely that the American vessels in the conferences are "so numerous as *to compare favorably with those of any other particular nation*" (R. 41). (Italics ours.) That is not a denial of the plain allegation in the appellant's complaint (R. 12, article 23) that *the conferences consist of steamship companies "most of which are owned by aliens residing in foreign countries, and most of whose vessels are operated under the flags of foreign countries"* (R. 12), or of the plain allegation in the Exhibit incorporated as part of Mr. Isbrandtsen's affidavit that *"the conference lines, both in number and tonnage, are predominantly foreign"* (R. 28B). Neither do the affidavits filed by counsel for the Secretary of Commerce deny the direct allegation in the complaint (R. 12, article 22) and in Mr. Isbrandtsen's affidavit (R. 26) that "The defendants Roper, Secretary of Commerce, and James C. Peacock are actively and directly competing with com-

plainant in the same trades" (R. 26) by means of "steamships which are operated in competition with the steamships of complainant" (R. 12, article 22).

It is evident therefore from this Record that the Secretary of Commerce in issuing the order against appellant was in fact furthering the selfish interest of the foreign lines dominating the steamship conferences, and was doing so at the direct expense of American shippers and of independent steamship companies like appellant. Surely that is not a legitimate purpose, or a valid American national shipping policy.

POINT III.

The District Court erred in ignoring this Court's decisions in *Humphreys* v. *United States*, 295 U. S. 602, and *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, that Boards or Commissions like this are not executive agencies, and in holding that the definition of "executive agency" in the Economy Act (U. S. C., Title 5, Sec. 125) as a bureau or board "in the executive branch of the Government" is ambiguous or includes a Board which has clearly never been "in the executive branch of the Government".

The District Court does not mention, and plainly overlooked, the fact that after finishing with "executive agencies" Congress, in another part of the same Economy Act, proceeded to provide for the permanent continuance of the United States Shipping Board through three Commissioners appointed by the President for fixed terms of years and confirmed by the Senate and not subject to removal or "abolition" excepting for inefficiency or misconduct.

The District Court further erred in resolving a "doubt" whether the Shipping Board was an "executive agency" on the basis of a mistaken assumption

that Congress was in session for sixty days after June 10, 1933 (the fact of common knowledge being that Congress adjourned for the Session on June 16, 1933), and on the basis of an assumption that Congress' action in a minute paragraph of two appropriation acts in "providing funds to pay the salaries and expenses" (R. 56) of certain employees in the Department of Commerce who called themselves a "Shipping Board Bureau", and in casually mentioning as mere matter of recital or citation the Shipping Acts and the attacked Executive Order by "number" and "date", constituted a "ratification" of the invalid Executive Order so as to repeal the plain and detailed provisions in the Economy Act that the Shipping Board was to continue permanently as a body entirely outside the executive departments or executive control.

The District Court further overlooked the fact that in the Appropriation Act of June 16, 1933, by appropriating money for salaries of the three Shipping Board Commissioners provided for permanently in the Economy Act, for the fiscal year ending June 30, 1934, Congress plainly invalidated (assuming for purpose of argument it needed invalidating) the Executive Order of June 10, 1933, purporting to give undesignated employees in the Department of Commerce the powers and offices of the Shipping Board Commissioners.

The District Court further overlooked the fact that Section 21 of the Shipping Act, 1916, which is U. S. Code, Title 46, Section 820, is not mentioned in either of the Appropriation Acts which it states (R. 56) in its opinion are a "ratification", and yet that is the one under which the Secretary of Commerce attempted to justify his order here involved. The only sections mentioned in those Appropriation Acts are U. S. Code, Title 46, Sections 804, 805, 861-889, and 891-891X, all of which relate to mail contracts, construction loan funds and other special matters which might be ad-

ministered by a bureau in an executive department, but do not include a single section of the Shipping Act, 1916, dealing with regulation or with the quasi-legislative or quasi-judicial functions of the United States Shipping Board.

In *Humphrey's Executor* v. *United States,* 295 U. S. 602, at page 624, this Court, referring to a similar regulatory body (the Federal Trade Commission), said:

> "The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. 'It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.' *Illinois Central R. Co.* v. *Interstate Commerce Comm'n,* 206 U. S. 441, 454; *Standard Oil Co.* v. *United States,* 283 U. S. 235, 238-239."

In *U. S. Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474, this Court said (at pp. 480 and 481):

> "The Shipping Act is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land. * * * In its general scope and purpose, as well as in its terms, that act closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect."

The District Court in the case at bar in mentioning in its opinion (R. 53-55) "Sec. 124" and "Sec. 125" of what it calls "The Executive Department Reorganization Act of June 30, 1932" (R. 53), fails to mention that the correct title of that Act is the Appropriations Act of June 30, 1932, Chapter 314 (commonly known as the Economy Act), and that the statute is quoted in full in 47 U. S. Statutes at Large 382, and that a simple examination of that Act (47 U. S. Statutes at Large 382, at pp. 408 and 413) demonstrates that the "Sec. 125" which the District Court mentions is really Section 402 under "Title IV.—Reorganization of Executive Departments" (47 U. S. Statutes at Large at p. 413) of the Economy Act, and that in another section—Section 306a (47 U. S. Statutes at Large 362 at p. 408)—in that very same Chapter 314 of that Economy Act Congress expressly provides under "Title III.—Miscellaneous Provisions * * * Reorganization of Shipping Board" (47 U. S. Statutes at Large, pp. 407 and 408) that the United States Shipping Board is to continue permanently as a board which should be entirely independent of the executive, as it had always been since its creation in 1916, but instead of seven commissioners should now, in furtherance of Congressional economy, consist of three commissioners to be nominated for a fixed term of years and confirmed by the Senate; and Congress itself in those sections 306a to 306h specifically provides what the reorganizing, economizing and consolidating, etc., shall consist of with respect to the Shipping Board and does not delegate or grant any authority whatever in that respect to the President, excepting merely the power to nominate commissioners and submit the nominations to the Senate. If the District Court had quoted in its opinion all the material parts of the Economy

Act (47 U. S. Statutes at Large 382, 408, 413), instead of only "Sec. 124" and mentioning "Sec. 125" (which is really section 402 at p. 413 of 47 U. S. Statutes at Large), the error into which it fell would be evident from its own opinion. The District Court plainly overlooked the fact that Congress itself in the Economy Act reorganized the Shipping Board and provided for its permanent continuance on an "economy" basis, and did not delegate to the President any power or duty whatever with respect to it. The President's powers were restricted to reorganizing executive agencies which were already within the Executive Dpartment, and did not include the United States Shipping Board, which is dealt with separately and is also separated by a completely different title and is contained in a wholly distinct and equally general subdivision of Chapter 314 of the Economy Act. Whatever the meaning of section 402 (referred to in the District Court's opinion as "Sec. 125", R. 55) may be when isolated from all the other sections in the Economy Act of June 30, 1932, and read by itself, its meaning is plain when read as it must be as part of the whole Economy Act in which it is contained.

The real question involved is not whether Congress ratified the Executive Order of June 10, 1933, but whether the meager citation or reference in the Appropriation Acts constitutes a repeal of the Economy Act of June 30, 1932, Chapter 314, sub-title United States Shipping Board, Section 306a, *et seq.*, which expressed a clear and unambiguous intention of Congress that the Shipping Board should be reorganized as therein provided and should continue permanently as a board of three commissioners holding offices for fixed terms of years and not removable by the Presi-

dent of the United States or under his control or the control of any other department in the Executive Department, excepting for malfeasance in office or misconduct. *Humphrey's Executor* v. *U. S.*, 295 U. S. 602.

No statute is to be construed as a repeal unless it is so clear as to admit of no ambiguity. The meager and almost meaningless and casual citations in the Appropriation Acts mentioned in the District Court's opinion cannot be said to be thus clear and unambiguous so that this Court could properly hold them to be a repeal under this well-settled rule that a repealing statute must be unambiguous and clear.

Moreover, a careful examination of the language of the Executive Order of June 10, 1933, and of the Appropriation Acts cited in the District Court's opinion indicates that if any intention is to be guessed at on the part of Congress and the President in the Executive Order and the Appropriation Acts it is that the intent was to transfer only the Fleet Corporation and such administrative duties of the United States Shipping Board as related to operation of government merchant vessels by the Fleet Corporation, construction loans, and mail contracts. It is only the sections of the Shipping Act and of the Merchant Marine Act dealing with the activities of the Fleet Corporation which are mentioned in the Appropriation Acts. The intention, therefore, if it is ascertainable or is to be forcibly inferred, seems to have been to transfer only such functions of the Shipping Board as were administrative and as were directly connected with the Fleet Corporation's activities as operator of government merchant vessels, and as lender of funds for ship construction and in connection with mail contracts.

POINT IV.

Congress had no power under the Constitution to authorize the President to transfer the functions of the United States Shipping Board to the Department of Commerce.

The functions of the United States Shipping Board were so broadly defined by Congress in the Shipping Act, 1916, and the Merchant Marine Act, 1920, and were of such a quasi-judicial and quasi-legislative character, that they obviously could not be performed properly or at all by an executive department or bureau, and it would have been a violation of the fundamental constitutional doctrine of separation of powers if Congress had intended those functions to be delegated to or exercised by an executive department or bureau. Assuming that a slight degree of legislative power may be delegated to an executive department, or rather become effective after a hearing and finding by an executive department, surely there is a limit and that is when, as in the present case, the legislative and judicial power attempted to be delegated is so great and substantial, and so inconsistent with its exercise by an executive department, that the executive department would become predominantly a legislative or judicial body rather than an executive body, so far as the exercise of those functions was concerned.

Humphrey's Executor v. *United States,* 295 U. S. 602, at pages 624, 625, 628 and 629.

Also the purported transfer of the regulatory functions of the Shipping Board to the Department of Commerce amounts to an unconstitutional delegation

of legislative power. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *Schechter* v. *U. S.,* 295 U. S. 495, 529. Congress in the Economy Act has in two respects abdicated the essential legislative functions vested in it. First, it has failed to define adequately the subject to which the Economy Act may be addressed. *Schechter* v. *United States,* 295 U. S. 495, 539, 541. And even if it be assumed that the subject is defined, Congress has failed to limit the range of the President's discretion over that subject. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *Schechter* v. *United States,* 295 U. S. 495.

The Economy Act states at the outset that:

> "The Congress hereby declares that a serious emergency exists by reason of the general economic depression; that it is imperative to reduce drastically governmental expenditures; and that such reduction may be accomplished in great measure by proceeding immediately under the provisions of this title.
>
> Accordingly, the President shall investigate the present organization of *all executive and administrative agencies of the Government* and shall determine what changes therein are necessary to accomplish the following purposes:". (Italics ours.)

Hereinafter follow the six purposes which Congress has declared shall be accomplished.

Furthermore, the Act states in Section 403 (U. S. C., title 5, sec. 126) that:

> "Whenever the President, after investigation, shall find and declare that *any* regrouping, consolidation, transfer, or abolition of *any* executive

agency or agencies *and/or the functions thereof* is necessary to accomplish any of the purposes set forth in section 401 of this title, he may by Executive order—

(a) Transfer *the whole or any part of any* executive agency *and/or the functions thereof* to the jurisdiction and control of *any other executive agency;*

(b) Consolidate the functions vested in *any* executive agency; or

(c) Abolish *the whole or any part of any executive agency and/or the functions thereof;* and

(d) Designate and fix the name and functions of *any* consolidated activity or executive agency and the title, powers, and duties of its executive head; except that the President shall not have authority under this title to abolish or transfer an executive department and/or all the functions thereof." (Italics ours.)

It is apparent from the above quoted provisions of the Act that Congress has utterly failed to provide a subject matter within which the limited discretion of the President is to play. Just as the range of the code-making authority was unlimited in its scope in the *Schechter* case, so is the President's power to consolidate and co-ordinate any and all agencies in the present case. The President is authorized to "transfer the whole or any part of any executive agency and/or the functions thereof to the jurisdiction and control of any other executive agency". As the President has purported to abolish the Shipping Board, so may he abolish the Interstate Commerce Commission, the Federal Trade Commission, and any other independent board. To use the words of Mr. Justice

Cardozo in his concurring opinion in the *Schechter* case (at p. 551):

> "The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant, if I may borrow my own words in an earlier opinion."

Second. Even if the Economy Act has defined the scope of executive action so as to satisfy the test laid down in the *Schechter* case, there has been a failure on the part of Congress to provide a standard or criterion to guide the President in the exercise of his duties within such defined scope. *Panama Co.* v. *Ryan*, 293 U. S. 388, at pages 415, 418, and 430. The purposes as set out in the Economy Act which are to be attained by executive order are as follows (sec. 401):

> "(a) To reduce expenditures to the fullest extent consistent with the efficient operation of the Government;
>
> (b) To increase the efficiency of the operations of the Government to the fullest extent practicable within the revenues;
>
> (c) To group, coordinate, and consolidate executive and administrative agencies of the Government, as nearly as may be, according to major purposes;
>
> (d) To reduce the number of such agencies by consolidating those having similar functions under a single head, and by abolishing such agencies and/or such functions thereof as may not be necessary for the efficient conduct of the Government;
>
> (e) To eliminate overlapping and duplication of effort; and

(f) To segregate regulatory agencies and functions from those of an administrative and executive character."

It is apparent from the above quoted provisions that the recited purposes are so broad and the ability to accomplish them so much a matter of individual opinion that Congress has utterly failed to declare an adequate standard for the guidance of the President. The Act consequently falls on the authority of *Panama Co.* v. *Ryan,* 293 U. S. 388.

Finally, the Executive Order of June 10, 1933, is in violation of "historic practice" (*Panama Co.* v. *Ryan,* 293 U. S. at p. 431) in that it fails to set forth the findings upon which action was taken. The President's arbitrary statement, "I have investigated * * * and have determined" is a completely inadequate finding of fact upon which to base his order.

POINT V.

The order of the Secretary of Commerce deprives appellant of its property without due process of law in violation of the Fifth Amendment to the Constitution.

It has been shown under Points I and II of this brief that the true purpose of compelling appellant to file and make "public" the information demanded as to rate transactions and commodity movements is not to further the public interest but to advise appellant's competitors of its actual rate and business transactions thereby enabling appellant's competitors to destroy it. Appellant has expressed to the Secretary of Commerce its complete willingness to submit the information required on the condition that such

information be kept for the use of the Government of the United States and not be published to appellant's competitors. The Secretary of Commerce has refused to acquiesce in appellant's request.

The cases clearly establish that the regulatory authority of even an impartial, quasi-legislative, quasi-judicial body such as the Interstate Commerce Commission is not unlimited. An excess of power employed by that body is subject to judicial review, and an order in excess of power will be stricken down. In *Louisville Co.* v. *Interstate Commerce Commission,* 184 Fed. 118 (C. C. Ky., 1910), the decree of the District Court was approved by this Court in 227 U. S. 88 (1912). The Court had before it for consideration an alleged misuse of the rate-making authority of a quasi-legislative body such as the Shipping Board or the Interstate Commerce Commission. The District Court said (184 Fed. at p. 123):

> "There is no restriction upon the commission in respect to the matters which it will take into consideration or the weight it shall give to every of such matters in informing itself what opinion it ought to give, *except that it shall not abuse its authority and proceed arbitrarily without regard to the justice of the case or to give a judgment not fairly within its power.*" (Italics ours.)

In that case the Court had an order of the Interstate Commerce Commission before it. Here, the Court has to consider the order of a department in the executive branch of the Government, a department which is neither quasi-legislative nor quasi-judicial, and whose impartiality is endangered by the facts that it is itself the owner of ships operating in competition with appellant's vessels (R. 26, 44)

that it is a member of, and is assisting, a conference or shipping combination (R. 44) which is competing with appellant (R. 26, 44) and which is already using a rebate or "exclusive contract" system as a means of coercing appellant and American shippers (R. 14). The affidavits filed by counsel for the Secretary of Commerce himself show (R. 37, 42) that the furtherance of these partisan objectives is at least a principal ground on which the order of the Secretary of Commerce here attacked is based. This constitutes an arbitrary invasion of appellant's rights guaranteed it by the due process clause of the Fifth Amendment to the Constitution.

CONCLUSION.

The final decree of the District Court should be reversed with costs, and the cause should be remanded to the District Court with instructions to enter a final decree in favor of appellant, enjoining permanently the enforcement of the order of the Secretary of Commerce of November 18, 1935.

Respectfully submitted,

JAMES W. RYAN,
Counsel for Appellant.

APPENDIX.

Statutes Involved.

Section 21, Shipping Act, 1916 (U. S. C., Title 46, Sec. 820):

"The board may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the board. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever wilfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or wilfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment."

Section 18, Shipping Act, 1916 (U. S. C., Title 46, Sec. 817):

"Every common carrier by water *in interstate commerce* shall establish, observe, and enforce just and reasonable rates, fares, charges, classi-

fications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the board and keep open to public inspection, in the form and manner and within the time prescribed by the board, the *maximum* rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the board and after ten days' public notice in the form and manner prescribed by the board, stating the increase proposed to be made; but the board for good cause shown may waive such notice.

Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice." (Italics ours.)

Section 2, Intercoastal Shipping Act, 1933 (U. S. C., title 46, sec. 844):

"Every common carrier by water *in intercoastal commerce shall file with the United States Shipping Board and keep open to public inspection* schedules showing all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route; and, if a through route has been established, all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route and points on the route of any other carrier by water. *The schedules filed and kept open to public inspection as aforesaid by any such carrier shall plainly show the places between which passengers and/or freight will be carried, and shall contain the classification of freight and of passenger accommodations in force, and shall also state separately each terminal or other charge, privilege, or facility, granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, or charges, or the value of the service rendered to the passenger, consignor, or consignee.* * * *" (Italics ours.)

Section 15, Shipping Act, 1916 (U. S. C., title 46, sec. 814):

"*Every common carrier* by water, or other person subject to this chapter, *shall file immediately with the board* a true copy, or, if oral, *a true and complete memorandum, of every agreement, with another such carrier* or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, *fixing or regulating trans-*

portation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, *regulating, preventing, or destroying competition;* * * * or in any manner providing for an *exclusive, preferential, or cooperative working arrangement.* The term 'agreement' in this section includes understandings, *conferences,* and other arrangements.

The board *may* by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly *discriminatory or unfair as between carriers,* shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. * * *

Every agreement, modification, or cancellation lawful under this section *shall be excepted from the provisions of sections 1 to 11, inclusive, and section 15 of chapter 1, of Title 15, Commerce and Trade, and amendments and Acts supplementary thereto* * * *" (the Sherman Anti-Trust Act and the Clayton Act). (Italics ours.)

Section 16, Shipping Act, 1916 (U. S. C., Title 46, Sec. 815):

"It shall be unlawful for any common carrier by water * * * To make or give any undue or unreasonable preference or advantage to any particular person, locality * * *."

Section 17, Shipping Act, 1916 (U. S. C., Title 46, Sec. 816):

"No common carrier by water in foreign commerce shall demand, charge, or collect any rate,

fare, or charge which is unjustly discriminatory between shippers or ports * * *."

Section 32, Shipping Act, 1916 (U. S. C., Title 46, Sec. 831):

"Whoever violates any provision of this chapter, except where a different penalty is provided, shall be guilty of a misdemeanor, punishable by fine of not to exceed $5,000."

Section 14, Shipping Act, 1916 (U. S. C., Title 46, Sec. 812):

"No common carrier by water shall * * *

First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. * * *

Fourth. Make any unfair or unjustly discriminatory contract with any shipper. * * *

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense."

Section 14a, Shipping Act, 1916 (U. S. C., Title 46, Sec. 813):

"The board upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property——

(1) Has violated any provision of the preceding section, or

(2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect to transportation of passengers

or property between foreign ports, deferred rebates or any other unfair practice designated in the preceding section * * *."

Section 22, Shipping Act, 1916 (U. S. C., Title 46, Sec. 821):

"Any person may file with the board a sworn complaint setting forth any violation of this chapter by a common carrier by water * * *.

The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter."

Section 23, Shipping Act, 1916 (U. S. C., Title 46, Sec. 822):

"Orders of the board relating to any violation of this chapter shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion. * * *"